Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

Ninth Circuit Holds that "Disposal" Includes Passive Migration Under CERCLA Section 107

The Ninth Circuit has ruled that passive migration of hazardous substances from one part of a contaminated site to another is sufficient to establish the "disposal" element of a CERCLA[1] cost recovery action. The Ninth Circuit joins the Fourth Circuit as the only two circuit courts of appeal to take this position.

Carson Harbor v. UNOCAL Corp.[2] was a cost recovery action stemming from the clean up of a trailer park located in the Dominguez Oil Field in Los Angeles County. The plaintiff, Carson Harbor, was a partnership that owned the trailer park.[3] While trying to refinance the property in 1993, Carson Harbor learned of a significant deposit of slag and tar in seventeen acres of wetlands that ran through the property and abutted a nearby highway storm water runoff area.[4] Once plaintiffs had cleaned up the site, they filed a cost recovery action against several persons, alleging that they were potentially responsible parties under CERCLA.[5]

A cost recovery action under CERCLA section 107 has four major elements. To prevail, a private party plaintiff must prove that:

> (1) there was a release or threatened release of a hazardous substance;
> (2) the release was from a "facility" as defined by CERCLA;
> (3) the release or threatened release caused the plaintiff to incur necessary response costs that were consistent with the National Contingency Plan; and,
> (4) the defendant is within one of four statutory classes of potentially responsible parties.[6]

The four statutory classes are: current owners and operators of a facility; persons who were owners or operators of the facility "at the time of disposal of any hazardous substance;" persons who arranged for the disposal of hazardous substances that ended up at the facility; and those who transported hazardous substances to the facility, if the transporter selected the facility.[7] Interestingly, CERCLA adopts several definitions from the Resource Conservation and Recovery Act (RCRA),[8] including the definition for the term "disposal."[9] The RCRA definition provides:

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that such solid or hazardous waste or any constituent thereof may enter into the environment or be emitted into the air or discharged into any waters, including ground waters. [10]

The defendants in *Carson Harbor* included local governments, an oil company that had leased the property years before, and two men who owned and operated the trailer park

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2000).

2. Carson Harbor Village, Ltd. v. UNOCAL Corp., 227 F.3d 1196 (9th Cir. 2000).

3. *Id.* at 1199.

4. *Id.* at 1199-1200.

5. *Id.* at 1201.

6. *Id.* at 1202 (citing 42 U.S.C. § 9601(a) and 9607(a)). The United States, Indian tribes, and individual states must prove the same elements as a private party plaintiff when seeking recovery, except that they may recover without a showing that costs were consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(A).

7. 42 U.S.C. § 9607(a)(1) to (4).

8. *Id.* §§ 6901-6991(h).

9. *Id.* § 9601(29) (adopting RCRA definitions for "disposal," "hazardous waste" and "treatment").

10. *Id.* § 6903(3).

in a partnership from 1977 to 1983 (the "Partnership Defendants").[11] Plaintiffs alleged, *inter alia*, that the Partnership Defendants were liable under CERCLA as past owners and operators of the site.[12] They had to show, therefore, that during the period 1977 to 1983, there was a "disposal" of hazardous substances at the site.[13]

All parties filed comprehensive motions for summary judgment.[14] They agreed that the tar and slag were hazardous substances,[15] that the plaintiffs had incurred costs to clean up the site,[16] and that the partnership defendants were prior owners of the site.[17] One of the contested issues was whether or not there was a "disposal" during the period of the Partnership Defendants' ownership.[18] The slag and tar that Carson Harbor cleaned up on the site had been in place since before the Partnership Defendants purchased the property.[19] The plaintiffs' theory was that passive migration of the contaminants in the groundwater and the release of lead from the tar and slag met the statutory definition of "disposal" of hazardous substances.[20] The Partnership Defendants argued that there was no "disposal" of hazardous substances during their ownership, as the tar, slag and lead had been there for decades before they purchased it.[21]

The district court agreed with the Partnership Defendants, and granted their motion for summary judgment.[22] The court found no evidence that the tar and slag were "disposed" on the property during the relevant ownership period—1977 to 1983.[23] The court reviewed the statutory definition of "disposal" and concluded that it requires some form of human action causing a release of hazardous substances.[24] Mere passive migration of preexisting hazardous substances is insufficient.[25] Ultimately, the district court found for the various defendants on all but one count, allowing a state law nuisance and trespass claim against UNOCAL.[26]

Plaintiffs appealed, and the Ninth Circuit reversed and remanded.[27] Regarding the CERCLA claims against the Partnership Defendants, the Ninth Circuit acknowledged a split in the circuits on the passive migration issue.[28] It held, however, that the district court erroneously decided that passive migration was not a "disposal" under CERCLA.[29]

The Ninth Circuit began its analysis by noting "the argument that [the definition of disposal] encompasses passive migration

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11. *Carson Harbor,* 227 F.3d at 1199.

12. *Id.* at 1202, 1205-06.

13. Liability of past owners and operators attaches to "any person who at the time of disposal of any hazardous substance owned or o perated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607 (a)(2).

14. *Carson Harbor,* 227 F.3d at 1201.

15. Carson Harbor Village, Ltd. v. UNOCAL Corp., 990 F. Supp. 1188, 1194 (C.D. Calif. 1997).

16. *Id.*

17. *Id.*

18. *Id.* at 1194. In a separate part of its opinion, the district court ruled that Plaintiffs' response costs were not "necessary." It found no evidence that the local water authority had directed the remediation and reasoned that CERCLA was not intended to cover costs incurred to enhance the economic value of private property. *Id.* at 1193.

19. *Id.*

20. *Id.*

21. *See id*. at 1194-95.

22. *Id.* at 1194-95, 1199.

23. *Id.* at 1194-95.

24. *Id.*

25. *Id.*

26. *Id.* at 1199.

27. Carson Harbor Village, Ltd. v. UNOCAL Corp., 227 F.3d 1196 (9th Cir. 2000).

28. *Id.* at 1206. There is a circuit split on the question of whether the statutory definition of disposal encompasses passive migration of hazardous substances. *Compare, e.g.*, Nurad, Inc. v. William Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992) ("disposal" includes passive migration) *with* United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000) ("disposal" requires active human conduct), ABB Indus. Sys. Inc. v. Prime Tech., Inc., 120 F.3d 351, 357-59 (2d Cir. 1997) (same), *and* United States v. CDMG Realty Co., 96 F.3d 706, 713-18 (3d Cir. 1996) (same).

is straightforward."[30] It then observed that definitions of several terms included in the statute had well-established passive meanings, including "discharge," "spill," and "leak."[31] Next, the court explicitly adopted other courts' rejection of what it called a "strained reading" of the term "disposal" in both a RCRA case and a CERCLA case.[32] The court felt that an expansive reading of the term would serve CERCLA's remedial purposes.[33] Next, the court found that "including the passive meaning of the statutory definition coheres with the structure and purpose of CERCLA's liability provisions," which, the court found, were to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[34]

Finally, the Ninth Circuit addressed several arguments, as contained in *United States v. CDMG Realty, Co.*,[35] against its decision to include passive migration in the definition of disposal.[36] The court acknowledged that Congress could have included passive terms like "leaching" in the statutory definition of disposal but chose not to, and that the court's interpretation would render the term "disposal" synonymous with the term "release," which is explicitly defined in CERCLA to include leaching.[37]

The Ninth Circuit failed convincingly to address some troubling aspects of its holding. For example, there is a helpful distinction between applying passive terms to releases of hazardous substances which are known to be present and under an owner's control and those which are neither known nor controllable. For example, in *Southfund Partners III v. Sears*,[38] the court found an owner liable where hazardous waste containers on the property filled with rainwater and leaked onto the soil. There, the court distinguished cases such as *Carson Harbor* where unseen passive migration of contaminants through the ground water occurred during a period of ownership.[39] In *Carson Harbor*, The Ninth Circuit failed to recognize that there is a difference between foreseeable passive releases into the environment and unknown passive releases from one part of the environment to another. Arguably, imposing liability in the latter case does not serve CERCLA's laudable purpose of affixing liability on those responsible for causing contamination.

With its decision in *Carson Harbor*, the Ninth Circuit has joined the Fourth Circuit as the only circuit to consider passive migration "disposal" sufficient to establish liability under CERCLA section 107.[40] As a consequence, many more former owners of property now face potential liability for unseen contamination they did not cause, and may not even have been aware of. Now that there is a definitive split in the circuit courts, the Supreme Court is likely to decide whether that reading comports with CERCLA's language and purpose. Lieutenant Colonel Connelly.

Penalties and the Defense Authorization Act for FY 2001

This is a postscript to an article published in last month's *The Army Lawyer*[41] that surveyed the impacts of section 8149 of the Department of Defense (DOD) Appropriations Act, FY 2000.[42]

29. *Carson Harbor*, 227 F.3d at 1210.

30. *Id.* at 1206.

31. *Id.*

32. *Id.* at 1207-10.

33. *Id.* at 1207.

34. *Id.* at 1207 (citing the court's prior decision in 3550 Stevens Creek Ass'n v. Barclays Bank of California, 915 F.2d 1355, 1357 (9th Cir. 1990)).

35. 96 F.3d 706 (3d Cir. 1996).

36. *Carson Harbor*, 227 F.3d at 1208-10 (citing to *CDMG Realty*, 96 F.3d 706, 714-17).

37. *Id.* at 1208.

38. 57 F. Supp. 2d 1369 (N.D. Ga. 1999).

39. *Id.* at 1377.

40. 42 U.S.C. §§ 9607 (200). *See* Nurad, Inc. v. William Hooper & Sons, 966 F.2d 837 (4th Cir. 1992).

41. *See* Lieutenant Colonel Richard A. Jaynes, *Assessing the Aftermath of Section 8149*, ARMY LAW., Nov. 2000, at 54.

42. Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (2000). Section 8149 directs that none of the funds appropriated for FY 2000 "may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law." *Id.* 113 Stat. 1271-72. For background on the Department of Defense Appropriations Act, 2000 and DOD and Army policy implementing it, see Major Robert Cotell, *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction*, ENVTL. L. DIV. BULL., Oct. 1999; *Section 8149 Update*, ENVTL. L. DIV. BULL., Nov. 1999.

On October 30, 2000, the President signed the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (NDAA FY01),[43] an Act that closed the chapter on Section 8149 but opened a new chapter of congressional interest in how environmental regulators pursue enforcement actions. This article notes key aspects of the NDAA FY01 which emerged from the Conference of Joint House-Senate Conferees with significant statutory text and report language that addressed environmental penalties and federal facilities.

The Joint Conferees removed from the NDAA FY01 a provision that would have generally discouraged settlements with the Environmental Protection Agency (EPA) if fines and supplemental environmental projects totaled $1.5 million or greater.[44] That provision was replaced with section 314—text that prohibits DOD and the Army from paying more than $2 million in fines or penalties to conclude the enforcement action against Fort Wainwright, Alaska.[45] This is a fitting post script to last year's section 8149, which was enacted out of congressional concern over EPA's attempt to impose a $16 million penalty at Fort Wainwright that was based almost entirely on "business" penalty criteria.[46] With section 314, Congress is sending a very clear message that it disapproves of the strong-arm tactics of EPA in the Fort Wainwright case. This conclusion is unmistakable from the text itself, and is resoundingly amplified in the Senate Armed Service Committee's (SASC) report that is part of the NDAA FY01's legislative history.[47] The SASC's report condemns EPA for its handling of the enforcement action at Fort Wainwright and rejects EPA's new ~~enforcement policy that encourages~~ EPA Regions to include "business" penalty assessments in fines against federal facilities.[48]

The SASC's report is even more compelling in light of concerns articulated by the Joint Conferees over the manner in which environmental regulators pursue enforcement actions against federal facilities. As the report states:

> The conferees note that a number of questions have been raised about the manner in which environmental compliance fines and penalties are assessed by state and federal enforcement authorities. Therefore, the conferees direct the Secretary of Defense to submit a report to the congressional defense committees no later than March 1, 2002, that includes an analysis of all environmental compliance fines and penalties assessed and imposed at military facilities during fiscal years 1995 through 2001. The analysis shall address the criteria or methodology used by enforcement authorities in initially assessing the amount of each fine and penalty. Any current or historical trends regarding the use of such criteria or methodology shall be identified.[49]

From the perspective of Army installations, this requirement to analyze and report enforcement practices must be focused on EPA. That is, Army installations have not encountered state regulators who have vigorously sought to apply business penalties to Army installations. Certainly, this report will be a unique and welcome opportunity to explain many of the frustrations DOD facilities have experienced in recent years in their dealings with EPA Regions' attempts to impose unlawful business penalties against Army installations. The ELD will be assembling the information for the Army's input to this report

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43. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000) (NDAA FY01) .This Authorization Act is the enacted version of House Bill 4205, 106th Congress (2000), which is a one-page bill that adopts and enacts the provisionsof House Bill 5408, 106th Congress (2000), the designation of the bill as it emerged from the Joint Conference. *See* H.R. CONF. REP. NO. 106-945 (2000). Consequently, references herein to sections 314 and 315 of the NDAA FY01 apply equally to House Bill 4205 and House Bill 54 0 8.The President's signing statement did not includ**a**ny comment on either of the Authorization Act's penalties provisions (that is, sections 314 and 315).

44. 146 CONG. REC. S 6538 (daily ed. July 12, 2000).

45. H.R. CONF. REP. NO. 106-945, at 760. The full text of section 314 follows:

> SEC. 314. PAYMENT OF FINES AND PENALTIES FOR ENVIRONMENTAL COMPLIANCE AT FORTWAINWRIGHT, ALASKA.
> The Secretary of Defense, or the Secretary of the Army, may pay, as part of a settlement of liability, a fine or penalty of notmore than $2,000,000 for matters addressed in the Notice of Violation issued on March 5, 1999, by the Administrator of the Environmental Protection Agency to Fort Wainwright, Alaska.

H.R. 5408, 106th Cong (2000).

46. "Business" penalties include the economic benefit of noncompliance and size-of-business fines *See* Lieutenant Colonel Richard A. Jaynes, *Assessing the Aftermath of Section 8149*, ENVTL. L. DIV. BULL., Oct. 2000 (discussing the Fort Wainwright case), and, *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL., Sept. 1999 (discussing business penalties); *New Resource on Economic Benefit Available*, ENVTL. L. DIV. BULL., Aug. 2000.

47. S. REP. NO. 106-292, at 265-67 (2000).

48. *Id.* Because of its tremendous relevance to section 314, an excerpt from the SASC's report dealing with FortWainwright and business penalties is appended to this article.

49. *Id.*

to Congress. The format for reporting details of enforcement cases will be worked out in the coming months with other DOD Services and the Office of the Secretary of Defense.

Finally, and unsurprisingly, the Act includes a provision intended to carry out the requirements of section 8149 with regard to the legislative package DOD submitted to Congress for approval. Section 315 of the NDAA FY01 approved all six enforcement action settlements the Army had submitted.[50] As noted in last month's article, the precise legal and fiscal impacts of Section 315 are unclear and warrant further examination. In any event, the Joint Conferees added in their report that they "are pleased with the Army's most recent efforts to reduce the level of fines and penalties received."[51] Army installations can take this as a word of encouragement as they continue their efforts to negotiate the minefield of environmental regulations. Hopefully the overall impact of section 8149, and now sections 314 and 315, will be to encourage environmental regulators and Army installations to work cooperatively to achieve and maintain compliance, and avoid becoming mired down in contentious enforcement-related issues. Lieutenant Colonel Jaynes.

50. NDAA FY01, Pub. L. No. 106-398, section 315. The Joint Conference Report for House Bill 5408 states that the purpose of this legislation is to implement "section 8149 of the Department of Defense Appropriations Act for Fiscal Year 2000." H.R. CONF. REP. NO. 106-945, at 760. It further states that "[t]he Secretary of the Army would be specifically authorized to pay following supplemental environmental projects carried out in satisfaction of an assessed fine or penalty: (1) $993,000 for Walter Reed Army Medical Center, Washington, D.C.; (2) $377,250 for Fort Campbell, Kentucky; (3) $20,701 for Fort G ordon, Georgia; (4) $78,500 for Pueblo Chemical Depot, Colorado; (5) $20,000 for Deseret Chemical Depot, Utah." *Id.* at 760-61. Section 315 also includes authorization for a fine of $7975 for Fort Sam Houston, Texas. NDAA FY01, Pub. L. No. 106-398, section 315.

51. H.R. CONF. REP. NO. 106-945, at 761.

Appendix

Senate Armed Services Committee Report 106-292 to Accompany Senate Bill 2549, National Defense Authorization Act for FY 2001 (May 12, 2000)

Payments of Fines and Penalties for Environmental Compliance Violations (section 342)

The committee recommends a provision that would require the Secretary of Defense or the secretaries of the military departments to seek congressional authorization prior to paying any fine or penalty for an environmental compliance violation if the fine or penalty amount agreed to is $1.5 million or more or is based on the application of economic benefit or size of business criteria. Supplemental environmental projects carried out as part of fine or penalty for amounts $1.5 million or more and agreed to after the enactment of this Act would also require specific authorization by law.

The committee recommends this provision as a result of concerns that stem from a significant fine imposed at Fort Wainwright, Alaska, (FWA), a related policy established by U.S. Environmental Protection Agency (EPA), and an apparent need for further congressional oversight in this area. On March 5, 1999, EPA Region 10 sent FWA a notice of violation (NOV) and on August 25, 1999, EPA sent a settlement offer of $16.07 million: (1) $155,000 for the seriousness of the offenses; (2) $10.56 million for recapture of economic benefit for noncompliance; and (3) an additional $5.35 million because of the "size of business" at FWA.

According to EPA, the $16.07 million fine was imposed to correct excessive emissions of particulate matter from an aging coal-fired central heat and power plant (CHPP) at FWA, and to impose a penalty for years of violations under the Clean Air Act (CAA). The EPA policy or rule that directs the application of economic benefit or "size of business" penalty assessment criteria to federal facilities is based on memoranda dated October 9, 1998, and September 30, 1999, issued by the EPA headquarters Federal Facilities Enforcement Office (FFEO). Notice and comment procedures were not used to promulgate these memoranda.

The compliance and enforcement history of the CHPP provides some insight into this committee's concerns regarding the EPA NOV. In the mid 1980s, EPA delegated its CAA program authority to the State of Alaska. In order to comply with opacity requirements, FWA purchased opacity monitors in 1988 and installed them in 1989, however, the monitors had a high failure and maintenance rate. In March 1994, the Alaska Department of Environmental Conservation (ADEC) issued an NOV for opacity violations at the FWA CHPP that identified a need for PM emission reductions. In response, FWA negotiated a compliance schedule with ADEC for the construction of a full-steam baghouse for each of the boilers in the CHPP.

FWA continued to work with ADEC from March 1994 to 1999 to: accomplish about $15.3 million worth of numerous CHPP upgrades for controlling air emissions; resolve Department of Defense (DOD) privatization issues; conduct a baghouse feasibility study; and seek military construction authorization for a $15.9 million baghouse project. In the interim, FWA received a CAA Title V Permit completeness determination from the state on February 19, 1998. As a result, FWA continues to operate the CHPP under a CAA Title V permit application, which contains schedules for compliance that were the result of careful coordination with ADEC.

The $15.9 million baghouse was programmed for fiscal year 2000 and was authorized and appropriated by Congress in fiscal year 2000. As planned, the baghouse design complies with all applicable CAA requirements, including compliance assurance monitoring. When the EPA NOV was issued, FWA was in compliance with the Title V schedules for implementing air emission control technologies agreed to with ADEC.

First, the committee questions EPA's regulatory judgment in assessing fines and penalties despite the fact that the installation was operating in good faith under a Title V permit application that is overseen by a state with delegated authority. Second, it is the committee's view that the application of economic benefit or "size of business" penalty assessment criteria to the DOD is inconsistent with the statutory language and the legislative history under section 7413 of title 42, United States Code.

The terms economic benefit and "size of business" suggest market-based activities, not government functions subject to congressional appropriations. In addition, the statement of managers accompanying the Clean Air Act Amendments of 1990 (Public Law 101 549, 104 Stat. 2399 (October 27, 1990)) provides that with respect to the economic benefit criterion: "Violators should not be able to obtain an economic benefit vis-à-vis their competitors as a result of their noncompliance with environmental laws." The committee is not aware that the DOD has competitors.

As a practical matter, the functions of DOD facilities are not analogous to private business. The DOD, unlike private sector, must fund all of its operations, to include environmental compliance, through congressional appropriations. "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." (U.S. Constitution, Article 1, Section 9, Clause 7; Anti-Deficiency

Act (ADA) 31 U.S.C. § 1501). Moreover, the expenditure of federal funds must be consistent with authorization and appropriation acts--Congress and the Office of Management and Budget oversee apportionment of funds to agencies during the fiscal year to avoid overspending—DOD allocates funds to the military departments, which in turn issue allotments to command and staff organizations. (31 U.S.C. § 1341(a)(1); Department of Defense Directive 7200.1, Administrative Control of Appropriations (1984)).

The committee has concluded that DOD payment of fines or penalties based on economic benefit or size of business criteria would interfere with the management power of the Federal Executive Branch and upset the balance of power between the Federal Executive and Legislative Branches, exceeding the immediate objective of compliance. Therefore, the committee recommends a provision that would prohibit the Secretary of Defense and the secretaries of the military departments from paying such fines and penalties without specific authorization by law.